UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/582,197	08/06/2007	Alexander Aldred	F3345(C)	3980

201 7590 12/01/2009

UNILEVER PATENT GROUP
800 SYLVAN AVENUE
AG West S. Wing
ENGLEWOOD CLIFFS, NJ 07632-3100

EXAMINER	
BEKKER, KELLY JO	

ART UNIT	PAPER NUMBER
1794	

NOTIFICATION DATE	DELIVERY MODE
12/01/2009	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

patentgroupus@unilever.com

Office Action Summary	Application No.	Applicant(s)	
	10/582,197	ALDRED ET AL.	
	Examiner	Art Unit	
	KELLY BEKKER	1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-4* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-4* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date *11/16/07*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-4 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

A broad range or limitation together with a narrow range or limitation that falls within the broad range or limitation (in the same claim) is considered indefinite, since the resulting claim does not clearly set forth the metes and bounds of the patent protection desired. See MPEP § 2173.05(c). Note the explanation given by the Board of Patent Appeals and Interferences in *Ex parte Wu*, 10 USPQ2d 2031, 2033 (Bd. Pat. App. & Inter. 1989), as to where broad language is followed by "such as" and then narrow language. The Board stated that this can render a claim indefinite by raising a question or doubt as to whether the feature introduced by such language is (a) merely exemplary of the remainder of the claim, and therefore not required, or (b) a required feature of the claims. Note also, for example, the decisions of *Ex parte Steigewald*, 131 USPQ 74 (Bd. App. 1961); *Ex parte Hall*, 83 USPQ 38 (Bd. App. 1948); and *Ex parte Hasche*, 86 USPQ 481 (Bd. App. 1949).

In the present instance, claim 1 recites the broad recitation “an aspect ratio of between 0.8:1 and 2:1”, and the claim also recites “an aspect ratio of... preferably between 0.8:1 and 1.5:1” which is the narrower statement of the range/limitation.

In the present instance, claim 3 recites the broad recitation “less than 1% w/w stabilizer”, and the claim also recites “more preferably not more than 0.5% w/w [stabilizer]” which is the narrower statement of the range/limitation.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 3, and 4 are rejected under 35 U.S.C. 102(b) as being anticipated by Fayard et al (US 5,919,510).

Fayard et al (Fayard) teaches of a frozen aerated confection comprising 20-150% overrun (Column 2 lines 42-51), less than 1% stabilizer, including 0.45% stabilizer, 0-8.5% fat, and a total solids content of about 30-40% (Examples 1, 12, and 13-16).

Regarding the confection as log shaped (i.e. a shape with a constant cross section) with a respective aspect ratio (i.e. height: width ratio) as recited in claim 1, by teaching that the confection is extruded from a horizontal or vertical nozzle with a diameter of 0.12-1cm (Column 3 lines 24-27 and Examples 1 and 2), Fayard teaches that the confection would maintain a constant cross section and thus be log shaped; i.e. as the nozzle shape remains constant in diameter, the product when extruded would remain at a constant cross section; and the confection would have an aspect ratio of 1:1; i.e. as the confection was extruded from a circular nozzle the extruded product would be in cylinder form and both the height and width of the cylinder would substantially equal the diameter (0.12-1cm) of the nozzle and the product would have an aspect ratio width: height of 1:1.

Regarding the ice content of the confection as between 30-55% at a temperature of -18C, as Fayard teaches of an aerated frozen confection which is substantially the same compositionally as the instantly claimed product, including substantially the same amount of solids and thus water, fat, and stabilizers, and as Fayard teaches of a composition which is produced in substantially the same manner as disclosed for the instantly claimed composition, including cold temperature extrusion at a temperature of -8C to -20C (Fayard, Column 2 lines 43-51), one of ordinary skill in the art at the time the invention was made would expect that the composition of Fayard contain substantially the same amount of frozen water at a temperature of -18C as the instantly claimed

composition, absent any clear and convincing arguments and/or evidence to the contrary.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claim 2 is rejected under 35 U.S.C. 103(a) as being unpatentable over Fayard et al (US 5,919,510).

Fayard teaches of an aerated frozen confection with a height of about 1cm as discussed above. Fayard teaches that the confection is extrude through a horizontal or vertical nozzle. Fayard teaches that the length and the diameter of the nozzle may be altered so long as the back pressure from the nozzle remains in the intended range. Refer specifically to Column 3 lines 24-31. Fayard teaches that the pressure remains in the intend range when the ratio of length to diameter of the extruder screw is from 30-60 (Column 4 lines 1-4).

Fayard is silent to the height of the confection as at least 4 cm as recited in claim 2.

Regarding the height of the aerated confection, it would have been obvious to one of ordinary skill in the art at the time the invention was made to adjust the diameter and length of the nozzle as taught by Fayard, depending on the intend use and corresponding desired size of the final product. For example, if the frozen confection was to be in the form of a single layer bar, it would have been obvious for the confection to be of a greater height, such as greater than 1cm, so that the consumer could eat a substantially sized bar (i.e. so that the consumer could easily pick up or cut the bar and consume it); whereas if the frozen confection was to be in the form of a 10 layered bar, it would have been obvious for the confection to be of a lesser height, such as less than

1cm, so that the layered bar was not at an excessive height in which the consumer had difficulty eating (i.e. so that the height of the layered bar would not be too large for the consumers mouth). To determine an appropriate height of a confectionary product would have been obvious and routine determination of one of ordinary skill in the art at the time the invention was made.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to KELLY BEKKER whose telephone number is (571)272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Kelly Bekker/
Examiner
Art Unit 1794